COLLAS CRILL

Chabra-cadabra: The magic of freezing injunctions against third parties

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One can't help but pity the plaintiff with an ironclad claim against a defendant with *apparently* no assets to their name - and thus none to freeze - to ensure a surefire favorable judgment can be met.

One also pities (even more so) the plaintiff who already holds such a judgment against such a defendant, but can find no means of monetising it. The sympathy only increases when you acknowledge the practice of using offshore jurisdictions to safeguard assets via the use of companies, trusts and nominees.

However, thanks to judicial ingenuity instigated by the courts of England and Wales and developed by the courts of the Cayman Islands (and other offshore jurisdictions) in their efforts to address the issues through the adoption of the Chabra injunction, plaintiffs have the means of freezing assets held in the name of a party against whom it has no claim (a non-cause of action defendant – the "**NCAD**"), on the basis that those assets are, in truth, the assets of the defendant (the cause of action defendant – the "**CAD**").

That adoption and development of the Chabra injunction has included legislative amendments in the Cayman Islands, as a result of which it is possible in Cayman to obtain a Chabra injunction against an NCAD where the injunction sought is in aid of foreign proceedings, and even when the NCAD is outside the jurisdiction.

What do I need to show to obtain a Chabra injunction?

1. "Good reason to suppose"

To expand the test in full, one must demonstrate that there is a good reason to suppose that the targeted NCAD asset could be available to satisfy a judgment made against the CAD. This test is in turn divided into two limbs which make it necessary to satisfy the Court:

- "that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or
- that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD." - *Algosaibi v Saad Investments Co Ltd* [2011 (1) CILR 178], applied recently in the BVI case of Parles AS & Daniel Perner v Winsley Finance Limited (BVIHCM2022/0123, 29 March 2023).

One must establish a case "which is more than barely capable of serious argument, but yet not necessarily one which the judge believes to have a better than 50% chance of success." - PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov [2013] EWHC 422 (Comm).

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2. Real risk of dissipation

So often the highest hurdle for those seeking freezing relief, one must establish that there is an objective risk of unjustified dissipation of the asset, such that, if the relief is not granted, there is a real risk that the plaintiff's judgment will go unsatisfied.

There must also be solid evidence of a current risk; it cannot merely be inferred.

However, the plaintiff can point to certain factors which may be regarded as relevant to the establishment of a real risk of dissipation. Those factors are too numerous for each to be included in this article, but they include (and the first one is especially pertinent in the context of seeking relief in the Cayman Islands):

- The use of offshore structures – this may be relevant but will not by itself be determinative, given the general acceptance that international business can legitimately be conducted through offshore vehicles. That said, if combined with a good arguable case of fraud, a "*web of offshore companies*" may be taken into account - VTB Capital plc v Nutritek International Corp and others [2012] 2 BCLC 437.
- Allegations of dishonesty – these may be a relevant consideration, but only where there is a good arguable case of dishonesty and that dishonesty is at the heart of the risk of dissipation.
- A lack of commercial probity – for example, a repeated and deliberate failure to pay invoices and court orders, despite being able to do so if it so chose.
- Conduct in legal proceedings – for example, failure to comply with Court orders, choosing not to cooperate with the Court or Court-appointed officers, misleading the Court.

3. "Just and convenient"

If satisfied that the two previous limbs of the test have been satisfied, the Court will then look at the position in the round and take account of where the balance of justice lies. At this stage, it will also remind itself that the Chabra jurisdiction "is exceptional and to be exercised with caution" - *New York Laser Clinic Ltd v Naturastudios Ltd and others* [2020] EWHC 560 (QB).

The Court will question whether it would be just to impose an injunction, or better to maintain the status quo. It will take into account whether, for example, the injunction would be especially prejudicial to either the CAD or NCAD.

Here, the Court may also consider whether any delay on the part of the plaintiff in seeking the injunction is such that it should be factored into the "just and convenient" question. Undue delay on the part of the plaintiff may also weaken an assertion of a real risk of dissipation.

What type of assets can be caught?

Assets of which the CAD is the ultimate beneficial owner - for example, assets held by the NCAD as nominee or trustee for the CAD - are the most likely to be caught.

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If beneficial ownership cannot be established, a sufficient degree of control may suffice but the crucial consideration remains whether the asset in question would be amenable to the execution of a judgment obtained against the CAD. If a route can be shown to the Court by which the NCAD's assets could become amenable to execution, then that may suffice.

The Court will "*broadly evaluate*" whether there is reason to suppose that the assets might be reachable; no case by case analysis is required - Alnajjar and another v DX9 Property Ltd (a company incorporated under the laws of the British Virgin Islands) and another company [2022] EWHC 926 (Ch).

For example, in Motorola Solutions, Inc and another company v Hytera Communications Corp Ltd and other companies [2020] EWHC 980 (Comm), the English Court found that there was no evidence that a NCAD subsidiary of the CAD held assets as nominee or trustee. Nevertheless, it held that assets held by that subsidiary were amenable to execution, because there was a complete chain comprising 100% shareholdings between the CAD and the NCAD.

Similarly, in PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov [2013] EWHC 422 (Comm) the assets of a company in which the NCADs held interests, and whose major shareholder was a company owned and controlled by the CAD, were deemed amenable to execution.

Monies held on the CAD's client account by an NCAD law firm to cover the CAD's fees and disbursements have also been deemed amenable because the CAD was entitled to the money when transferred to the law firm or because it would be in her power to seek the return of it and the court would have power to order her to do so - *Phoenix Group Foundation v Cochrane and another* [2017] EWHC 418 (Comm).

Recent developments

In March 2024, in HRH Princess Deema v Gibbs and Elysium Yacht Ltd (unreported, 7 March 2024) Justice Doyle of the Grand Court of the Cayman Islands granted a freezing order in respect of the Cayman assets of a CAD, including his 100% shareholding in a Cayman registered company, Elysium Yacht Ltd. An ex tempore judgment reveals that the Chabra jurisdiction was considered as part of His Lordship's deliberations.

The decision underscores the willingness of the Cayman Court to avail itself of the jurisdiction to grant injunctive relief, in appropriate circumstances, to ensure that orders of foreign courts are not prevented from being satisfied by dint of the fact that assets are held offshore.

In 2023, in the aforementioned *Parles AS* case, the BVI Court held that Chabra relief was available in support of foreign insolvency proceedings, with an unsecured creditor being permitted in exceptional circumstances to apply for the relief, rather than the liquidator or provisional liquidator, who would be the more customary applicant.

For more information on Chabra injunctions, please get in touch with Insolvency and Corporate Disputes team, who will be happy to assist you.

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